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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 ROBERT W. NETTLES, III.,)

10 Plaintiff,)

11 v.)

12 MICHAEL J. ASTRUE, Commissioner of the)
13 Social Security Administration,)

14 Defendant.)

Case No. C10-86-JCC-BAT

**REPORT AND
RECOMMENDATION**

15 Plaintiff, Robert W. Nettles, III., seeks review of the denial of his application for Social
16 Security Supplemental Income (“SSI”) and Disability Insurance Benefits (“DIB”) by the
17 Commissioner of the Social Security Administration, after a hearing before an administrative law
18 judge (“ALJ”). Dkt. 6.

19 Nettles raises 6 issues on review but only one need be addressed at this time: the ALJ’s
20 failure to develop the record by obtaining testing of Nettle’s intelligence and cognitive
21 functioning. Dkt. 19. For the reasons below, the Court concludes the ALJ erred in failing to
22 develop the record and recommends the case be **REVERSED** and **REMANDED** for further
23 administrative proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Nettles first applied for SSI and DIB in February 2004. Tr. 138, 142. His applications

1 were denied (Tr. 90) and he did not seek further administrative review. In January 2006, he
2 again applied for SSI and DIB benefits. Tr. 148, 154. After his application was denied initially
3 and on reconsideration (Tr. 94, 97), the ALJ held a hearing in September 2008 and issued a
4 decision in January, 2009 finding Nettles not disabled. Tr. 6. The Appeals Council denied
5 Nettles' request for review, making the ALJ's decision the final decision of the Commissioner.
6 Tr. 1.

7 **II. STANDARD OF REVIEW**

8 This Court may set aside the Commissioner's denial of disability benefits when the ALJ's
9 findings are based on legal error or not supported by substantial evidence. 42 U.S.C. § 405(g);
10 *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). The ALJ determines credibility and
11 resolves conflicts and ambiguities in the evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
12 Cir. 1995). The Court may neither reweigh the evidence nor substitute its judgment for that of
13 the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence
14 is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
15 must be upheld. *Id.*

16 **III. DISCUSSION**

17 **A. The ALJ's Duty to Develop the Record**

18 Nettles has a history of mental health problems and significant substance abuse. Tr. 12.
19 His mental health treatment records raise concerns of mental retardation (Tr. 556) and
20 significant intellectual and developmental impairment. Tr. 248, 605. Specifically Nettles'
21 treating psychiatrist Dr. Paul Grekin, M.D. opined he suspected Nettles "has significant
22 intellectual impairment" (Tr. 605) and Nettles' medical records from Seattle Counseling Service
23 note a "deferred" diagnosis of mild mental retardation. Tr. 556. Nettles contends there is thus a

1 genuine issue about the severity of his intellectual deficits and that by failing to obtain
2 standardized intelligence testing, the ALJ failed to properly develop the record. Dkt. 19 at 14.

3 The Court agrees. The ALJ has a “special duty to fully and fairly develop the record and
4 to assure that the claimant's interests are considered,” even where, as here, “the claimant is
5 represented by counsel.” *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003) (quoting *Brown*
6 *v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). The ALJ has a duty to develop the record further
7 when “there is ambiguous evidence or when the record is inadequate to allow for proper
8 evaluation of the evidence.” *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001).

9 Here, the ALJ denied Nettles’ request to develop the record on the grounds that Dr.
10 Jennifer Cheng-Shannon’s state agency consultative report adequately addressed Nettles’
11 cognitive and learning abilities. Tr. 26.¹ Dr. Cheng-Shannon opined Nettles had a GAF score of
12 40 and suffered from mood disorder, substance abuse in remission, learning disorder, panic
13 attacks, rule out bipolar disorder, substance induced mood disorder, PTSD, and social anxiety
14 disorder. Tr. 476. Dr. Cheng-Shannon performed a Mental Status Examination and under the
15 section entitled “intellectual functioning” noted she asked him to name the states adjacent to
16 Washington, whether he could do “serial 7s,” whether he could perform a three-step command
17 and spell a word backwards, and how an apple and orange are similar. *Id.* at 475. While these
18 questions revealed Nettles had functional limitations, they did not clarify whether Nettles is
19 mentally retarded or the extent of his cognitive limitations. Dr. Cheng-Shannon did not perform
20 IQ testing, attempt to determine Nettles’ IQ or whether Nettles was mentally retarded or

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22 ¹ The ALJ also rejected Nettles’ request on the grounds “the purpose of a consultative
23 examination is not to assess treatment need, but to assess functioning.” Tr. 26. Nothing shows
Nettles requested the evaluation to assess his treatment needs. Rather the ALJ’s statement that
Nettles’ requested an additional cognitive examination to assess cognitive impairment” indicates
Nettles sought an assessment of his functioning, not his treatment needs.

1 cognitively impaired and gave no medical opinions about these matters. *Id.*

2 As the evidence, including Dr. Cheng-Shannon's opinion, about Nettles' intellectual
3 functioning is both ambiguous and inadequate to determine his intellectual functioning, the Court
4 concludes the ALJ erred in denying Nettles' request for a consultative examination. The case
5 should therefore be remanded to develop the record regarding Nettles' intellectual and cognitive
6 impairments including IQ testing and a determination of whether Nettles is mentally retarded.
7 As this may affect the ALJ's five step² analysis, the Court need not address, at this point, the
8 other issues raised by Nettles or the ALJ's findings³ at each step.

9 IV. CONCLUSION

10 For the foregoing reasons, the Court recommends that the Commissioner's decision be
11 **REVERSED** and this case **REMANDED**. On remand, the ALJ should (1) develop the record
12 regarding Nettles' intellectual or cognitive impairments including IQ testing and determine
13 whether Nettles is mentally retarded, (2) consider whether Nettles' intellectual or cognitive
14 impairments meet or equal a listing, (3) reevaluate, as necessary, the medical and lay evidence in
15 view of the new evidence that is developed, and (4) reevaluate, as necessary, Nettles' RFC before
16 proceeding to steps four and five. A proposed order accompanies this Report and
17 Recommendation.

18 DATED this 11th day August, 2010.

19 s/ BRIAN A. TSUCHIDA
20 United States Magistrate Judge
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22

23 ² 20 C.F.R. §§ 404.1520, 416.920.

³ See TR. 9-29 (ALJ's Decision).